

Independent Contractor Study Committee
Minutes: April 13, 2004

Attendance: Riley Johnson, James Nys, Spook Stang (substituting for Brian Smith), Nancy Butler, Larry Jones, Dave Cogley, Cary Hegreberg, Webb Brown, Carl Schweitzer, Jerry Driscoll, Larry Mayo, Jason Miller, Bob Worthington, Jerry Keck and Byron Roberts

Public in Attendance: Marvin Jordan, Eddy McClure

Facilitator: John Andrew

Minutes: Keith Messmer

1. Larry Jones explained that a number of the committee members in an attempt to simplify the process had gotten together to talk about what they, as insurance and business representatives would like to see. The objective was to have an exemption that could be counted on and yet prevent abuses of the system by incorporating checks and balances. He handed out a package proposal containing the following:
 1. Maintain the exemption in the law for IC's from the Workers' Compensation Act
 2. Keep the exemption certificate process, but provide DOL screening, enforcement and audit authority.
 3. Provide for education of IC and employers and consider either requiring or urging use of a Memorandum of Agreement (contract).
 4. Make the exemption certificate conclusive as to the IC status.
 5. DOL's costs would increase and therefore the cost of the exemption certificate would increase on IC's.
 6. Allow for a provisionary IC exemption certificate (perhaps it is not conclusive, but that needs further discussion)
 7. Consider for further discussion if penalties on any of the parties involved would be a useful enforcement tool.

Larry said the desire is to implement a rigorous screening procedure for determining IC status, realizing that the result may be that some will be unable to get the exemption. He stressed the importance of all parties being educated and the memorandum outlining the rights of the parties to the contract. The proposal would allow people to break into business with a short provisionary period with some sort of significant requirement.

Discussion of the proposal:

Jerry D: If you make the exemption conclusive, but you violate the memorandum, what happens?

Larry J: The person is still an IC.

Jerry D: Person paying you starts violating the agreement?

Larry J: Still an IC.

Jerry D: Why would anyone have employees?

Larry J: Same reasons as we previously discussed.

Jerry D: Would you remove exclusive remedy?

Larry J: That is not anticipated.

Jerry D: Any way conclusiveness can be overcome?

Larry J: If their exemption is on file with the Department, then there is no overcoming the conclusiveness.

Dave: When person decides to be an IC he takes upon himself the risk of injury. Conclusiveness gives the assurance to both parties.

Jason: How do you see when the employer and IC decide that someone is an employee?

Larry J: Can do it.

Jason: Because he becomes an employee, he would be red flagged because he has a waiver. What would happen?

Larry J: Same as today. You would ask the parties what the relationship is.

Cary: The concern is that mandatory workers' compensation won't fly in the legislative arena. What do you think would fly as an alternative?

Jerry D: With the exception of "conclusiveness" it would fly. The potential of fraud for mandatory coverage is high. State Fund has opposed in the past. You would also have to increase fraud provisions.

John: Is there heartburn over the other areas of the proposal, ignoring conclusiveness?

Jason: I would need more time to digest this.

Bob: Some significant department decisions would have to be worked through.

Larry J: We need to agree on the concept and then work through the details. Preserving conclusiveness and fraud prevention was our focus.

Jerry K.: If come to general agreement the department could come back with how we would implement this. We would bring back "this is the way the department would implement this on a day to day basis". Would need to put in statute the department's authority to revoke with some sort of hearing process. Work on the educational details and cost it out. See what the impact on the fee would be.

Byron: Oversight and education were mentioned in our discussion, but we did not get into the details. If the applicant says he is a partner, should show the documentation from the Secretary of State for example.

John: Give us the authority that if there is a hailstorm and 20 contractors come in we can deny their IC applications.

Jason: If people are not paying workers' compensation they can be much more competitive. The medical costs when someone is hurt have to be absorbed by someone. The wage loss costs are born by their family and others. There are some compelling arguments for making it mandatory.

Jim: What is happening in the committee?

Eddy: The committee is looking at the list of exemptions. Have alternatives from get rid of everything to leave it alone. May 5th the committee will be meeting to review the options Pat Murdo is presenting.

Jerry K: They are looking at all of the exemptions with the exception of the IC. They are looking to this group for the answer here.

Eddy: Correct.

Jim: Can we assume they think there are too many exemptions?

Eddy: No, this is just one of their charges to review.

John: Is the committee comfortable with the department coming up with a model?

Jerry D: Does the memorandum have to be used on every job or you are an employee?

Larry J: Could if this is what the committee wants. This is only a concept at this point.

Cary: Without conclusive, we are back to mandatory workers' compensation. MCCF is not willing to take the risk otherwise.

John: Conclusiveness can still be litigated.

Cary: Right, but with revisions we tighten it up so it minimizes the potential for litigation.

Jerry D: Mandatory coverage for construction only?

Cary: How do you determine what is construction and what isn't?

Jerry D: Mandatory coverage leads to abuses. The exemption is meaningless as there is no penalty if you don't have one. Make sure they meet the AB test. Educate people how it really works. Following the B part more important than the paper. Have a contract for the job.

Carl: Is the education for the person getting the exemption or the guy hiring?

Jerry D: Person doing the hiring.

Cary: The IC definition defies the nature of many jobs.

Jerry D: Separate category may be needed for truckers, but other construction jobs it is cut and dried. The responsibility is on the department to educate. The memorandum outlines A & B.

Carl: How does this prevent abuse? What if 4 kids come in?

Larry J: Follow the AB test and you are shielded? If the test were clear, I would agree. But the test is not clear. Numerous examples where the court focused on one item to find employment.

Jerry D: Can you write a higher standard?

Larry J: I don't think so. The court is inserting fault into the test where I don't think it was intended. It is too complicated to afford any real protection.

Jason: Cary has a good point. Mandatory comp for certain classifications? High risk?

Cary: But you would still have abuses, misclassification?

Jason: That is easier to check than the relationship.

Cary: Might be workable.

Larry J: Mandatory first day coverage is already in the Act.

John: If the 4 kids come in with one adult, the department asks questions and says yes or no.

Dave: You look for some documentation.

Larry J: Common sense look at the documentation. SOS for partnership, DOR for taxes. Person just starting out, just bought the tools, dogs and gun rack?

Spook: In trucking may have been leased to same company for 4 to 5 years, but can leave at any time. Since they don't change employers they can't show that they work for multiple companies, everything else fits.

Cary: Same problems in logging.

Larry J: Case law says 1 employer means an employee; breakout by industry may be needed.

Byron: The business aspect of this is important. For the IC going into business, going through these things will eliminate 2/3 of the abuse.

Jerry K: Going back to the 4 kids, provisional for person with no documentation? Additional education will be needed.

Jerry D: If person comes in with proof of prior work, haven't they violated the requirements and are subject to penalty in your proposal?

Bob: Go back to employer, not the individual. If the individual falsifies the application then there are penalties.

Webb: Can't be one unless you have been one? There is a problem, Jerry is right.

John: If an employee decides to go IC, the best they would get is a provisional IC.

Larry J: Getting a drivers license is an example. You get a learners permit.

Jerry K: In a provisional, memorandums of understanding should be a requirement, be able to show us these when finished.

Bob: Have multiple requirements, meet some of these but may not have paid taxes yet and that is ok.

John: Can revoke if necessary?

Bob: Even though you have an IC you can still work for someone as an employee.

Jason: The problem is that when someone files a claim. We are talking about putting the C test back in?

Larry J: Yes, part C is back in to prevent abuse.

Jason: In concept may not have a problem, but I have a concern over money and process to insure IC is legitimate. Health care cost is high if a person is not covered.

Larry J: A pilot's license is another example. There are some extreme requirements. The cost could be raised significantly to prevent abuse.

Byron: Concerned about IC's working in groups for a manager in construction companies. There are a number of IC's circumventing workers compensation. It is legal right now. There has to be a way to screen these people, lots of administrative oversight.

Larry J: C provision only applies if they don't have coverage on themselves. Allow them to work without becoming an employee. Modify part C to allow this.

John: Can you change it so in cases of fraud the exemption would not be conclusive?

Larry J: Then you have rebuttable. There is a case where fraud trumped the exemption.

Cary: What if a person under 18 gets an IC.

Kevin: A person under the age of 18 can't enter into a contract. We require parent to sign. I am not totally comfortable with it.

Cary: At margin, parent must sign if under 18. I think about the newspaper abuses. If I am a parent, I want to be able to circumvent contract.

Carl: What good is the AB test if you add the C test?

Larry J: Exclusive remedy is worth the cost for businesses. If not conclusive in provisional then why would anyone hire them? Need it to be conclusive.

John: Shall the department draft alternatives?

Byron: Draft administrative process and legislative language.

Bob: Need minimal standards for the provisional.

Larry J: Still review, should have everything but clientele.

Jim: Not conclusive until memorandum of understanding is completed.

Larry J: If have own coverage, work as an IC so doesn't have to be treated as an employee.

Jason: Concern that coverage might be requirement for getting the job.

John: What kind of mechanism do we need for everyone getting ideas into us?

Larry J: What would the topics be?

Jerry K: We don't need anything on 1. Part 2 we need feedback on what you would like for audit functions. Part 3 feedback on the practicality of memo, how it would work. Part 4 nothing needed, clearly revoke if not meeting. Part 5 penalty recommendations to make it meaningful. Part 6 what would the costs rise to? Timeframes and conditions for provisional. What does it mean if not conclusive?

Riley: What is the price tag on this? Would it be annual, bi-annual or what?

Jerry K: Would the group support going to 1 year?

Spook: Had this raised before and the legislature got beat up. Had to lessen the requirements, it was pretty iron clad process before. Started riots in the cities.

Jerry D: Why do you need money for enforcement if it is conclusive?

Jerry K: Don't you want enforcement? So we can revoke if we see abuses.

Jerry D: With conclusive, A & B don't really matter.

Larry J: Stop satisfying IC, may not meet the criteria later, and then aren't entitled to exemption and the criteria are enforced. I envision the department going out and investigating and revoking, putting the employer on notice. Need to have cops, so that IC's remain true IC's.

Jerry D: The IC proof is conclusive if you get hurt.

Larry J: Satisfy the criteria or it can be revoked.

Jerry D: Get hurt you are an IC. If the department comes ahead of time you are not an IC.

Larry J: Similar to a drivers license.

Carl: I wonder about enforcement. It is a vague thing to figure out. I can't imagine looking at a drywall. Is that his equipment? Has he been told when to come? It will be difficult.

Jason: The screening process initially will limit the number of IC. We won't have 30,000+ IC's.

Kerry K: If principals have conversed, may have rehearsed the answers, but it will strengthen the insurers case.

Bob: Does this answer the industries problem that is Jason's concern?

Byron: No, something needed in the screening process that eliminates that abuse, you don't have it now.

Dave: As long as you have the exemption you will never have a level playing field. Mandatory coverage is the only answer if you are trying to eliminate the fraud perspective.

Jerry K: Employees verses IC's, can't we determine if fraud exists on the job site? If they bring in a whole crew and claim IC's, that is abuse.

Dave: The policy reason for having the exemption is to create business.

Jason: You know it when you see it, but how do you codify? I think we have to leave it up to the department.

Cary: MCCF also has a health insurance part. If don't have it, it is passed off to someone else. How do you avoid shifting the burden to others? The higher the cost goes fewer employers will be willing to offer. Having 30,000 IC's exacerbating the rise in health care premiums for everyone. Need to find way to prevent abuses or have mandatory coverage.

John: The minority viewpoint needs to be shared with the department. Any alternatives to conclusive bring back to the next meeting and share with everyone.

Riley: There is a loophole. If individual is hired as IC for one week and after that was not treated as an IC and gets hurt it is conclusive. If the department discovers you before you get hurt you are not an IC. Will the court question this?

Jerry D: If violating A & B, just because the department didn't do their job. Why am I an IC?

Byron: It is a 2 party thing. If you know your operating other than an IC, the IC has the responsibility to correct.

Larry J: The department has a duty. If the duty is breached, you did not protect me from my self. The "theory of liability" exists. The IC can sue the employer, as there is no exclusive remedy.

Jerry D: If you have certification that is conclusive, you can't fire.

Larry J: Sure you can, you risk breach of contract suit.

Riley: You are relying on a benevolent court. I don't have that faith. Eliminating class of IC for those that don't have the exemption?

Larry J: Take a caterer, hired by a homeowner. If gets hurt can sue the homeowner, not as an employee. Can operate without the exemption, but this could classify you as an employee. There is no prohibition against person operating exactly as they have.

Riley: This should be explained to the legislature.

Larry J: This will not effect what people do, only the consequences.

Riley: Doesn't prevent me from being a lobbyist?

Larry J: If my business is a lobbying entity, I might insist you get your IC, otherwise if you are hurt you will be my employee. It increases the protection you have.

Kevin: It is a gray area. If it is a regular or recurring part of the business, you should get an IC.

Jerry D: Under this proposal, if you get hurt you can file suit, the insurer is out of the picture, it is the employer that gets hurt.

Larry J: Wouldn't change the current system.

Jim: What other programs will use this? Should check with other agencies to see if this causes them any problems.

Jerry K: We will write up a proposed process for "screening of an IC applicant".

Jason: Mandatory workers compensation should be written up in the final report, for a later session date.

Kevin: The burden of proof is on the individual to prove they are an IC.

Riley: Need to write up what is being proposed x, y and z and does it need legislation or rule.

Larry J: The conclusive language I wrote here does not incorporate part C.

Carl: Jerry D. keeps bringing up great questions, but no solutions.

Jerry D: Meet the AB test.

Carl: The test doesn't work.

Larry J: Too many gray areas, it does not work well. Part A: control is established by the method of payment, furnishing of equipment, exercising control, and the ability to control.

Jerry D: Are there changes we can make to the AB test?

Kevin: The court does its thing. First started out as furnishing of valuable equipment, now it can be any.

John: The department will draft proposals and get them out to the group ahead of time to allow comments and revisions.

The next meeting will be dependent on how long it takes the department to draft proposals. Stay tuned.

